No. 15335

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY, a Corporation,

Appellant,

vs.

OHIO FARMERS' INDEMNITY COMPANY and PRUDENTIAL ASSURANCE COMPANY OF LONDON,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—1-11-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

EDWARD A. FRIEND, Esq.,
519 California Street,
San Francisco, Calif.,
For Appellant.

LEO J. WALCOM, Esq.,
68 Post Street,
San Francisco, Calif.,

For Appellee Ohio Farmers Indemnity Company.

LLOYD M. TWEEDT,
JAMES A. QUINBY,
STANLEY J. COOK,
DERBY, COOK, QUINBY & TWEEDT,
1000 Merchants Exchange Building,
San Francisco, Calif.,

For Appellee Prudential Assurance Company of London, sued herein as John Doe.

In the United States District Court for the Northern District of California, Southern Division
Civil No. 34158

THE CANADIAN INDEMNITY COMPANY, a Corporation, Plaintiff,

vs.

OHIO FARMERS INSURANCE COMPANY, a Corporation, Defendant.

ANSWERS TO INTERROGATORIES PROPOUNDED BY PLAINTIFF TO DEFENDANT

* * *

[Insurance Policy of Ohio Farmers Insurance Company]

* * *

Ohio Farmers Indemnity Company, LeRoy, Ohio, a Stock Insurance Company, Herein Called the Company

Agrees with the Insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the Declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy.

Insuring Agreements

1. Coverage A—Bodily Injury Liability—Automobile

* * *

Coverage B—Bodily Injury Liability—Except Automobile

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury,

sickness or disease, including death at any tim
resulting therefrom, sustained by any perso
and caused by accident.

* * *

11. Defense, Settlement, Supplementary Payment

As respects the insurance afforded by th
other terms of this policy the Company shall

(a) defend any suit against the Insured a
leging such injury, sickness, disease or destru
tion and seeking damages on account thereo
even if such suit is groundless, false or fraudu
lent, but the Company may make such investiga
tion, negotiation and settlement of any clai
or suit as it deems expedient;

* * *

(c) pay all expenses incurred by the Com
pany, all costs taxed against the Insured in an
such suit and all interest accruing after entr
of judgment until the Company has paid
tendered or deposited in court such part of suc
judgment as does not exceed the limit of th
Company's liability thereon;

* * *

(e) reimburse the Insured for all reasonabl
expenses, other than loss of earnings, incurre
at the Company's request.

The amounts incurred under this insurin
agreement, except settlements of claims an
suits, are payable by the Company in additio
to the applicable limit of liability of this policy

* * *

[Endorsed]: Filed December 15, 1954.

In the District Court of the United States, Northern District of California, Southern Division

Civil No. 34158

THE CANADIAN INDEMNITY COMPANY, a corporation, Plaintiff,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, JOHN DOE and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32914-C; RICHARD ROE and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB32913-L, Defendants.

FIRST AMENDED COMPLAINT IN DECLARATORY RELIEF

Plaintiff complains of defendants and for cause of action alleges:

I.

That the plaintiff is a Canadian corporation; that the defendant Ohio Farmers Indemnity Company is an Ohio corporation; that all of the remaining defendants are subjects of Great Britain and/or British business associations; that the amount in controversy exceeds $3000.00.

II.

That on the 17th day of September, 1954, plaintiff had in force its liability policy number 25 CPL

1911 covering the liability of that certain Louis Store located at 3925 MacArthur Boulevard, Oakland, California, to parties injured on the premises of said store to the extent of $100,000.00; that said contract of insurance is by its terms excess to all other insurance available to the insured.

III.

That plaintiff is informed and believes and therefore alleges that on the date aforementioned the defendants had policies of liability insurance in full force and effect covering the liability of Louis Stores Inc. toward all parties injured on the premises of such Louis Stores, or injured by reason of negligence imputable to Louis Stores Inc.

IV.

That on the 17th day of September, 1954, one Virginia Christensen was seriously injured on the premises of that certain Louis Store located at 3925 MacArthur Boulevard, Oakland, California, allegedly as the result of the negligence of an employee or employees of Louis Stores Inc.

V.

That by reason of the facts herein alleged a dispute exists between the plaintiff and the defendants concerning their respective obligations to investigate, defend against, or pay any liability that may be assessed against Louis Stores Inc. and its employees as a result of the injuries sustained by Virginia Christensen.

Wherefore plaintiff prays for a decree of this court declaring the respective rights and liabilities of the plaintiff and the defendants.

/s/ EDWARD A. FRIEND,
Attorney for Plaintiff

[Endorsed]: Filed Jan. 5, 1955.

[Title of District Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Comes now the defendant Ohio Farmers Indemnity Company, a corporation, and answers the first amended complaint of plaintiff on file herein, and by way of defense thereto, admits, denies and alleges:

I.

Admits the allegations set forth in Paragraph II of said first amended complaint, save and except, expressly denies that the said contract of insurance is, by its terms, excess to all other insurance available to the insured, and that it is, in fact, concurrent, contributing and pro-rata insurance.

II.

Answering the allegations of Paragraph V of said first amended complaint, this answering defendant denies that there is any dispute concerning the respective obligations of the parties on its part. That at all times mentioned herein, Ohio Farmers Indemnity Company, a corporation, has had a policy with a limit of $10,000.00 for bodily injury cov-

erage other than products liability or automobile liability. That by the "escape clause" appearing in the policy issued by plaintiff to Louis Stores, Inc., there appears the following insofar as the claimant Virginia Christensen is concerned:

"Other Insurance. If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy."

That under the policy issued by this answering defendant the "escape clause" reads:

"Other Insurance. If the insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declaration bears to the total applicable limit of liability of all valid and collectible insurance against such loss;"

That the two "escape clauses" are mutually repugnant and therefore the obligation of the plaintiff and defendant for the investigation, defense, costs and payments for the claim of Virginia Christensen, if established to be due under said policies, should be pro-rated in proportion to the respective

limits of liability; that this answering defendant is ready to assume its pro-rated obligations under the terms of the respective policies.

Wherefore, this answering defendant prays that plaintiff take nothing by its complaint and that the same be dismissed herefrom.

HEALY AND WALCOM,
/s/ LEO J. WALCOM,
Attorneys for Defendant

[Endorsed]: Filed Jan. 25, 1955.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Defendant The Prudential Assurance Company Limited of London, a corporation, the underwriter subscribing to policy number EB 32914-C, sued herein as John Doe, and all other underwriters at Lloyd's London subscribing to Lloyd's policy No. EB 32914-C, answers the amended complaint herein as follows:

I.

The amended complaint fails to state a claim against said defendant upon which relief can be granted.

II.

Answering paragraph I of said amended complaint, said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph, except said defendant admits that it is

a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland.

III.

Answering paragraph II of said amended complaint, as amended by more Definite Statement herein, said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph.

IV.

Answering paragraph III of said amended complaint, said defendant as to itself denies each and every allegation contained in said paragraph. In this respect, said defendant alleges that on or about the 1st day of September, 1954, it issued to Louis Stores, Inc. a certificate of excess public liability insurance No. EB 32914-C. A copy of said certificate of insurance is annexed hereto, marked Exhibit A, and is expressly incorporated in and made a part of this answer.

V.

Answering paragraph IV of said amended complaint, said defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph.

VI.

Answering paragraph V of said amended complaint, said defendant as to itself denies each and every allegation contained in said paragraph. In this respect, said defendant alleges that it has no

privity of contract with plaintiff by reason of any of the matters alleged in said amended complaint; that no demand has been made upon said defendant by the assured under the policy of insurance referred to in said amended complaint; that no demand has been made by anyone else upon said defendant by reason of the matters set forth in said amended complaint; that there is and can be no justifiable controversy between plaintiff and said defendant by reason of any of the matters set forth in said amended complaint.

VII.

A determination of the matters set forth in said amended complaint would serve no useful purpose in that such determination would not be a final and binding determination of the rights and liabilities of all parties to said alleged contracts of insurance or of all parties to said action brought by said Virginia Christensen.

Wherefore, said defendant prays that the amended complaint herein be dismissed without relief to plaintiff and that defendant recover its costs herein.

DERBY, COOK, QUINBY & TWEEDT,

/s/ By LLOYD M. TWEEDT,

Attorneys for said Defendant

Acknowledgment of Service Attached.

EXHIBIT A
CERTIFICATE OF INSURANCE

No. EB 32914-C. Issued by Swett & Crawford.

Assured: Louis Stores, Inc. Expiration: September 1, 1957.

In accordance with authorization granted to Swett & Crawford by certain Companies in England whose names and the proportions underwritten by them are or will be on file in the office of said Swett & Crawford and also on file in the office of Sedgwick, Collins & Co., Limited, of London, England (such Companies being hereinafter called the Underwriters.

Pursuant to such authorization the Underwriters do hereby bind themselves, each for his own part and not one for another, in favor of Louis Stores, Inc., Assured. Address: 3201 Shattuck Avenue, Berkeley 5, California. Type of coverage: First Excess Comprehensive Public Liability Insurance; in the amount of Forty/Thirty/Thirty Thousand Dollars the Excess of Ten/Twenty/Twenty Thousand Dollars Bodily Injury.

Beginning at 12:01 A. M. on the 1st day of September, 1954 and ending at 12:01 A. M. on the 1st day of September, 1957, standard time at the place of location of risks insured, and in accordance with the terms and conditions of the form(s) attached.

Amount: $40/30/30,000.00; Rate XS; Amount: 10/20/20,000.00; Rate BI; Premium $7,920.00; 4% Federal Tax $316.80, 3% State Tax $237.60, ½% Stamping Fee $39.60, Total $8,514.00.

1. It is expressly understood and agreed by the Assured by accepting this instrument that Swett & Crawford is not one of the Underwriters or Assurers hereunder and neither is nor shall be in any way or to any extent liable for any loss or claim whatever, as an Assurer, but the Assurers hereunder are only those Companies in England whose names are on file as hereinbefore set forth.

2. If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Certificate shall become void and all claims hereunder shall be forfeited.

3. This Certificate may be cancelled on the customary short rate basis by the Assured at any time by written notice or by surrender of this Certificate to Swett & Crawford. This Certificate may also be cancelled, with or without the return or tender of the unearned premium, by Underwriters, or by Swett & Crawford in their behalf by delivering to the Assured or by sending to the Assured by mail, registered or unregistered, at the Assured's address as shown herein, not less than 10 days' written notice stating when the cancellation shall be effective, and in such case Underwriters shall refund the paid premium less the earned portion thereof on demand, subject always to the retention by Underwriters hereon of any minimum premium stipulated herein (or proportion thereof previously agreed upon) in the event of cancellation either by Underwriters or Assured.

4. This Certificate of insurance shall not be assigned either in whole or part, without the written

consent of Swett & Crawford endorsed hereon.

5. Loss or damage to the property insured occasioned by war, invasion, hostilities, acts of foreign enemies, civil war, rebellion, insurrection, military or usurped power or martial law or confiscation by order of any Government or public authority not covered.

6. This insurance is made and accepted subject to all the provisions, conditions and warranties set forth herein and in any forms or endorsements attached hereto, all of which are to be considered as incorporated herein, and any provisions or conditions appearing in any forms or endorsements attached hereto which alter the Certificate provisions stated above shall supersede such Certificate provisions in so far as they are inconsistent therewith.

7. United States Internal Revenue Documentary Stamps in the amount required and applicable to this insurance have been affixed to the office record of this Certificate retained by Swett & Crawford. The Law provides for no Federal Tax refund once the insurance attaches.

This Certificate shall not be valid unless signed by Swett & Crawford.

Dated at.....this....day of.....

Swett & Crawford,

By .....

Lloyd's Excess Public Liability Form
(Including Products Liability)
(Direct Insurance)

Underwriters hereby agree, subject to the terms,

conditions and limitations hereinafter mentioned, to indemnify the Assured in respect of accidents occurring during the period stated herein for any and all sums which the Assured shall by law become liable to pay and shall pay or by final judgment be adjudged to pay to any person or persons (excepting employees of the Assured injured during the course of their employment) as damages for bodily injuries, including death at any time resulting therefrom, caused by accident arising out of the hazards covered by and as defined in the underlying policy/ies specified in the Schedule herein and issued by the Ohio Farmers Indemnity Company, hereinafter called the "Primary Insurers,"

Provided always that it is expressly agreed that liability shall attach to Underwriters only after the Primary Insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

$10,000.00 ultimate net loss in respect of each person and, subject to that same limit each person, $20,000.00 ultimate net loss in respect of each accident but, as regards Products Liability, $20,000.00 ultimate net loss in the aggregate in any one policy year (hereinafter referred to as the "Primary Limit or Limits"); and Underwriters shall then be liable to pay only such additional amounts as will provide the Assured with a total coverage under the policy/ies of the Primary Insurers and this Certificate combined of $50,000.00 ultimate net loss in respect of each person and, subject to that same limit each person, $50,000.00 ultimate net loss in respect of

each accident but, as regards Products Liability, not exceeding $50,000.00 ultimate net loss in the aggregate in any one policy year.

Schedule

The underlying policy/ies hereinbefore mentioned: Ohio Farmers Indemnity Company Policy Number CL7591 or any renewals thereof.

Conditions

1. Premium Computation (delete clause not applicable).

(a) Deleted.

(b) The premium for this Certificate is computed by applying to the gross premium of the policy/ies of the Primary Insurers a percentage calculated at 100 per cent of the Manual Increase percentage in use by the Bureau Companies for ascertaining the difference in premium between

(I) A policy with limits equal to the limits of the policy/ies of the Primary Insurers and

(II) A policy with limits equal to the limits of this Certificate and of the policy/ies of the Primary Insurers combined,

subject to a minimum premium of $7,920.00.

Attached to and forming part of Certificate No. EB 32914-C.

Issued to: Louis Stores, Inc. Dated: September 1, 1954.

(Provisions on the back of this form are hereby referred to and made a part hereof.)

SCL 5268 (T.P.7)

Printed in U.S.A. 53-405

2. Payment of Costs. "Costs" incurred by the Assured personally, with the written consent of Underwriters, and for which the Assured is not covered by the said Primary Insurers, shall be apportioned as follows:

(a) In the event of claim or claims arising which appear likely to exceed the Primary Limit or Limits, no "Costs" shall be incurred by the Assured without the written consent of Underwriters.

(b) Should such claim or claims become adjustable previous to going into court for not more than the Primary Limit or Limits, then no "Costs" shall be payable by Underwriters.

(c) Should, however, the sum for which the said claim or claims may be so adjustable exceed the Primary Limit or Limits, then Underwriters, if they consent to the proceedings continuing, shall contribute to the "Costs" incurred by the Assured in the ratio that their proportion of the ultimate net loss as finally adjusted bears to the whole amount of such ultimate net loss.

(d) In the event that the Assured elects not to appeal a judgment in excess of the Primary Limit or Limits Underwriters may elect to conduct such appeal at their own cost and expense and shall be liable for the taxable court costs and interest incidental thereto, but in no event shall the total liability of Underwriters exceed their limit or limits of liability as stated above, plus the expenses of such appeal.

3. Application of Salvage. All salvages, recoveries or payments recovered or received subsequent

to a loss settlement under this Certificate shall be applied as if recovered or received prior to such settlement and all necessary adjustments shall then be made between the Assured and Underwriters, provided always that nothing in this clause shall be construed to mean that losses under this Certificate are not recoverable until the Assured's ultimate net loss has been finally ascertained.

4. Attachment of Liability. Liability under this Certificate shall not attach unless and until the Primary Insurers shall have admitted liability for the Primary Limit or Limits, or unless and until the Assured has by final judgment been adjudged to pay a sum which exceeds such Primary Limit or Limits.

5. Maintenance of Primary Insurance. This Certificate is subject to the same warranties, terms and conditions (except as regards the premium, the obligation to investigate and defend, the amount and limits of liability and the renewal agreement, if any, and except as otherwise provided herein) as are contained in or as may be added to the policy/ies of the Primary Insurers prior to the happening of an accident for which claim is made hereunder and should any alteration be made in the premium for the policy/ies of the Primary Insurers during the currency of this Certificate, then the premium hereon shall be adjusted accordingly.

It is a condition of this Certificate that the policy/ies of the Primary Insurers shall be maintained in full effect during the currency of this Certificate except for any reduction of the aggregate

limit contained therein solely by payment of claims in respect of accidents occurring during the policy year.

6. Cancellation. This Certificate may be cancelled at any time at the written request of the Assured or may be cancelled by or on behalf of Underwriters provided ten days' notice in writing be given. If this Certificate shall be cancelled by the Assured, Underwriters shall retain the earned premium hereon for the period that this Certificate has been in force or the short-rate proportion of the minimum premium whichever is the greater. If this Certificate shall be cancelled by Underwriters, they shall retain the earned premium hereon for the period that this Certificate has been in force or pro rata of the minimum premium whichever is the greater. Notice of cancellation by Underwriters shall be effective even though Underwriters make no payment or tender of return premium.

7. Notification of Claims. The Assured upon knowledge of any accident or occurrence likely to give rise to a claim hereunder shall give immediate written advice thereof to Swett & Crawford.

8. Fraudulent Claims. If the Assured shall make any claim knowing the same to be false or fraudulent, as regards amount or otherwise, this Certificate shall become void and all claim hereunder shall be forfeited.

Definitions

1. Accident. The word "accident" shall be understood to mean an accident or series of accidents arising out of one event or occurrence.

2. Ultimate Net Loss. The words "ultimate net loss" shall be understood to mean the sums paid in settlement of losses for which the Assured is liable after making deductions for all recoveries, salvages and other insurances (other than recoveries under the policy/ies of the Primary Insurers), whether recoverable or not, and shall exclude all expenses and "Costs."

3. Costs. The word "Costs" shall be understood to mean interest on judgments, investigation, adjustment and legal expenses (excluding, however, all expenses for salaried employees and retained counsel of and all office expenses of the Assured).

4. Policy Year. The words "policy year" shall be understood to mean a period of one calendar year commencing each year on the day and hour first named above.

Endorsement Number 1.

In consideration of the premium charged hereunder it is understood and agreed that:

(1) The words "caused by accident" shall be deemed to be deleted from the insuring clause of this certificate.

(2) The words "accident" or "accidents" wherever appearing in this certificate shall be deemed to read "occurrence" or "occurrences" respectively.

(3) Definition No. 1 (accident) shall be deemed to be deleted and replaced by the following:

1. Occurrence. The word "occurrence" shall be understood to mean an occurrence or series of occurrences arising out of one event.

All other terms and conditions remaining unchanged.

This slip is attached to and made a part of Certificate No. EB32914-C.

Issued to: Louis Stores, Inc. Effective: September 1, 1954.

End. No. 2.

Premium $ Nil
Total $ Nil

Kind: First Excess Comprehensive Public Liability Insurance.

Term: September 1, 1954 to September 1, 1957.

In consideration of the premium charged, it is hereby understood and agreed, that Paragraph 2 of Form SCL 5268 attached hereon, is amended to read as follows:

Provided always that it is expressly agreed that liability shall attach to underwriters only after the primary insurers have paid or have been held liable to pay the full amount of their respective ultimate net loss liability as follows:

$10,000.00 ultimate net loss in respect of each person and, subject to that same limit each person $20,000.00 ultimate net loss in respect of each accident but, as regards products liability, $25,000.00 ultimate net loss in the aggregate in any one policy year (hereinafter referred to as the "Primary Limit or Limits"): and underwriters shall then be liable to pay only such additional amounts as will provide the assured with a total coverage under the policy/ies of the primary insurers and this certificate combined of

$50,000.00 ultimate net loss in respect of each person and, subject to that same limit each person, $50,000.00 ultimate net loss in respect of each accident but, as regards products liability, not exceeding $50,000.00 ultimate net loss in the aggregate in any one policy year.

United States Internal Revenue Documentary Stamps in the amount shown above, applicable to this insurance have been affixed to the Accounts copy of this endorsement. The law provides for no Federal Tax refund once the Insurance attaches.

The effective date of this endorsement is Septembr 1, 1954.

All other terms and conditions remain unchanged.

This endorsement is attached to and made a part of Certificate No. EB 32914-C.

Issued to: Louis Stores, Inc. Broker: Charles Epstein Company. Date of issue: 11/4/54. By: rf.

Contract 54/2405. Code No. 43714.

End. No. 3.

Premium $ Nil

Total $ Nil

Kind: First Excess Comprehensive Public Liability Insurance.

Term: September 1, 1954 to September 1, 1957.

In consideration of the premium charged, it is understood and agreed that wherever the assured has contracted to protect any individual, firm, or corporation by insurance such individual, firm, or corporation shall be deemed an assured under this policy but the liability of the underwriters as respects such individual, firm, or corporation shall be

limited to the amount of insurance contracted to be carried by the assured but in no event shall such liability in the aggregate exceed the underwriters' limit of liability as expressed in this policy. It is understood, however, that this policy does not insure any individual, firm, or corporation whose operations or business is not incidental or necessary to the business of the assured herein named.

United States Internal Revenue Documentary Stamps in the amount shown above, applicable to this insurance have been affixed to the Office Record of this endorsement. The law provides for no Federal Tax refund once the insurance attaches.

The effective date of this endorsement is September 1, 1954.

All other terms and conditions remain unchanged.

This endorsement is attached to and made a part of Certificate No. EB 32914-C.

Issued to: Louis Stores, Inc. Broker: Charles Epstein Company. Date of issue: 11/4/54. By: rf. Contract 54/2405. Code No. 43714

Service of Suit Clause (U. S. A.)

It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the insured (or reinsured), will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

It is further agreed that service of process in such suit may be made upon Surplus Line Adjusting Company, Swett & Crawford and/or J. T. Ryan as agents for Mendes & Mount, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the insured (or reinsured) to give a written undertaking to the insured (or reinsured) that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which makes provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the insured (or reinsured) or any beneficiary hereunder arising out of this contract of insurance (or reinsurance), and hereby designate the above-named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

[Endorsed]: Filed May 27, 1955.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE 36

Plaintiff requests defendants, within ten (10) days after service of this request, to make the following admissions for the purpose of this action only, and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That Exhibit "A" attached hereto is a true copy of the complaint for damages filed in the Superior Court of the State of California, in and for the County of Alameda, on January 31, 1955.

2. That on the same date the aforementioned complaint was filed, January 31, 1955, Bruce Walkup, counsel for the plaintiff in the Superior Court action, filed an affidavit for the issuance of subpoenas to take the depositions of Tom Piperis, Earl Correia, Clifton Land and Donald Nolan.

3. That Exhibit "B" attached hereto is a true copy of a registered letter mailed by Edward A. Friend on February 15, 1955, to the Claims Manager of Ohio Farmers Indemnity Company, one party defendant in this action; that on the same date carbon copies of Exhibit "B" were mailed as indicated to Healy & Walcom, Louis Stores, Inc. and to Derby, Cook, Quinby & Tweedt, at their respective addresses.

4. That Ohio Farmers Indemnity Company received the registered letter reprinted as Exhibit

"B" and receipted therefor on February 16, 1955; that Ohio Farmers Indemnity Company retained the law firm of Healy & Walcom to represent the co-defendants Earl Correia, Clifton Land and Donald Nolan; that said law firm did represent said co-defendants at depositions taken on March 2, 1955, and at all subsequent times to and including the present.

5. That Exhibit "C" attached hereto is a true copy of the first amended complaint for damages filed in the Superior Court action during the first week of March 1955.

6. That Exhibit "D" attached hereto is a true copy of the answer to first amended complaint filed by Edward A. Friend on behalf of defendants Louis Stores, Inc. and Tom Piperis; that Edward A. Friend was retained by The Canadian Indemnity Company to represent said defendants in the Superior Court action.

7. That Exhibit "E" attached hereto is a true copy of the answer to first amended complaint filed by Healy & Walcom on behalf of defendants Earl Correia and Clifton Land.

8. That the Superior Court action came on for trial by jury on November 22, 23 and 28, 1955; that in said trial Leo J. Walcom appeared as counsel for defendants Earl Correia and Clifton Land; that Edward A. Friend appeared as counsel for defendants Louis Stores, Inc. and Tom Piperis; that prior to commencement of trial the action was

dismissed as to defendants Hopkins Food Center and all fictitious defendants; that defendants Land and Correia testified; that no other witness was called in their behalf by Mr. Walcom.

9. That at the close of Plaintiff's evidence the motion of defendant Tom Piperis for a judgment of non suit was granted by the court and judgment was thereupon entered in favor of said defendant.

10. That the Superior Court Judge instructed the jury in part as follows:

"If you find from the evidence that any employee of defendant Louis Stores, Inc., including either of the defendant employees, Earl Correia or Clifton Land, was negligent while acting in the course and scope of his employment for said Louis Stores, Inc., you are instructed that you must impute the negligence of said defendant employee or employees to defendant Louis Stores, Inc., and that if you believe that plaintiff is entitled to a verdict under the instructions given to you by the Court and the facts as presented in evidence, such verdict should be rendered against defendant Louis Stores, Inc., and such defendant employee or defendant employees found by you to be negligent."

11. That at the conclusion of all the evidence, argument and instructions the jury returned its verdict as follows:

In favor of plaintiff Virginia Christensen and against defendants Clifton Land and Louis Stores, Inc., in the sum of $35,000.00, and in favor of de-

fendant Earl Correia against plaintiff Virginia Christensen; that judgment has been entered upon said verdict.

Dated: December 5, 1955.

/s/ EDWARD A. FRIEND
Attorney for Plaintiff

EXHIBIT "A"

In the Superior Court of the State of California, in and for the County of Alameda

No. 263199

VIRGINIA CHRISTENSEN, Plaintiff,

vs.

LOUIS STORES, INC., a corporation, HOPKINS FOOD CENTER, PIPERIS BROTHERS, TOM PIPERIS, EARL CORREIA, CLIFTON LAND, DONALD NOLAN, FIRST DOE, SECOND DOE, THIRD DOE, FIRST DOE COMPANY and SECOND DOE COMPANY, Defendants.

COMPLAINT FOR DAMAGES

Plaintiff complains of defendants, and each of them, and for a cause of action alleges that:

I.

Defendants Doe are sued pursuant to the provisions of Section 474 of the California Code of Civil Procedure.

II.

At all times herein mentioned defendant Louis Stores, Inc., was and is a corporation doing business in the State of California.

III.

At all times herein mentioned defendant Piperis Brothers was and is a partnership doing business in the City of Oakland, County of Alameda, State of California.

IV.

At all times herein mentioned defendants, Tom Piperis, First Doe and First Doe Company were doing business in the City of Oakland, County of Alameda, State of California, under the fictitious name and style of Hopkins Food Center with their principal place of business as 3925 MacArthur Boulevard, Oakland, California. Said defendants operated at said address a public market commonly referred to as Hopkins Food Center.

V.

At all times herein mentioned defendants, Louis Stores, Inc., and Second Doe Company, were tenants of defendants, Tom Piperis, First Doe and First Doe Company, operating a grocery concession or department in said Hopkins Food Center.

VI.

At all times herein mentioned defendants, Earl Correia, Clifton Land and Donald Nolan, were agents, servants and employees of defendant Louis Stores, Inc., and defendants, Tom Piperis, First Doe, First Doe Company and Second Doe Company,

and were acting in the course and scope of their employment and agency by said defendants.

VII.

At all times herein mentioned said Hopkins Food Center was so constructed and laid out that there were public aisles or thoroughfares running throughout said market. Said market consisted of various concessions, including a meat department, a produce department and a grocery department. Said public aisles or thoroughfares running throughout said market ran through said grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company. Said aisles and particularly the aisles running through said grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company, were open for the use of customers of said market and of said Louis Stores, Inc., and Second Doe Company.

VIII.

On or about September 17, 1954, at or about 7:00 p.m. of said day, plaintiff was a business invitee of defendants above named in said Hopkins Food Center and in said grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company, and was walking in an aisle open to the customers of said market and located in the grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company.

IX.

At said time and place defendants, and each of them, so carelessly and negligently operated, main-

tained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner so as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery department thereof lawfully using said aisle.

X.

As a direct and proximate result of said carelessness and negligence of defendants, and each of them, as aforesaid, plaintiff was caused to trip and fall over said cardboard carton in said aisle and as a direct and proximate result of said fall in said aisle as aforesaid plaintiff received the injuries and damages hereinafter set forth.

XI.

By reason of the premises plaintiff received the following injuries: Shock to her nervous system, comminuted fracture of the right olecranon, comminuted fracture of the right coronoid process, fracture of the proximal shaft of the right ulna, comminuted impacted fracture of the head of the right radius, injury to the ulnar nerve in the right arm, injury to her right shoulder and neck and other injuries presently undiagnosed.

Plaintiff is informed and believes, and therefore alleges upon such information and belief, that certain of said injuries will be permanent in nature, the extent of said permanent injuries being unknown to plaintiff at this time.

XII.

By reason of the premises it became necessary for plaintiff to incur expenses for hospitals, doctors, nurses, X-ray technicians and other services required in the care and treatment of her said injuries, and plaintiff's damage in this respect is presently unascertained as said services are still continuing, and plaintiff prays leave to insert her elements of damage in this respect when the same are finally determined.

XIII.

At all times prior to September 17, 1954, plaintiff was physically able and in good health and was self-employed as a delicatessen operator and was operating a delicatessen known as Virginia's Delicatessen located in said Hopkins Food Center at 3925 MacArthur Boulevard, Oakland, California. As a direct and proximate result of said injuries received by plaintiff as aforesaid and as a direct and proximate result of the permanent injuries and disability suffered by plaintiff as a result of said injuries as aforesaid, plaintiff has been rendered physically unable to continue with her employment as a delicatessen operator and has been forced to terminate the operation of said delicatessen permanently. Plaintiff is informed and believes that she will be permanently incapacitated from engaging in her former employment as a delicatessen operator. Prior to said injuries plaintiff made a profit of approximately $3,000.00 per year from the operation of said delicatessen and plain-

tiff has thereby been damaged and will in the future be damaged in the sum of approximately $3,000.00 per year because of her inability to operate said delicatessen business in the future.

XIV.

By reason of the premises plaintiff has been generally damaged in the sum of $100,000.00.

Wherefore, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages in the sum of $100,000.00.
2. For special damages as prayed for herein;
3. For costs of suit; and
4. For such other and further relief as the Court deems proper.

BRUCE WALKUP
Attorney for Plaintiff

Duly Verified.

EXHIBIT "B"

Registered Mail
Return Receipt Requested

February 15th, 1955

Claims Manager
Ohio Farmers Indemnity Company
120 Bush Street
San Francisco, California

Dear Sir:

Re: Christensen vs. Louis Stores, Inc., Earl Correia, Clifton Land, Donald Nolan, et al., Alameda County No. 263199 and also your policy no. 7591 issued to Louis Stores, Inc.

I am attorney for Louis Stores, Inc. in the above

entitled action. Three employees of Louis Stores, Inc. are named as party defendants, together with the corporation itself and others. Those three are Earl Correia, Clifton Land and Donald Nolan. Demand is hereby made upon you under the above captioned policy, and, in particular, the endorsement headed "Defense of Employees," that you undertake the defense of these three defendants.

Enclosed are two copies of summons and complaint, subpoena to take deposition, and notice of taking deposition, which documents were served upon Earl Correia and Clifton Land last week. It is to be expected that Donald Nolan will be served shortly with summons and complaint and subpoena to take deposition.

Please note that depositions of various parties in this case have been calendared for February 24th, beginning at 1:00 p.m. The depositions of the three employees whose defense you are requested to assume are set for 2:00, 3:00 and 4:00 p.m.

I shall telephone the office of Bruce Walkup, attorney for the plaintiff, and request a few days time so that your defense counsel may appear on behalf of these three employees. I shall appreciate your informing me of what firm undertakes the defense so that I will be able to cooperate with such defense counsel.

Respectfully yours,

Edward A. Friend

cc's: Healy & Walcom, Louis Stores, Inc. Attn: T. E. Louis. Derby, Cook, Quinby & Tweedt.

EAF:lk

EXHIBIT "C"

[Title of Superior Court and Cause.]

FIRST AMENDED COMPLAINT
FOR DAMAGES

Plaintiff files herein as of course her first amended complaint and complains of defendants, and each of them, and for a cause of action alleges that:

I.

Defendants Doe and sued pursuant to the provisions of Section 474 of the California Code of Civil Procedure.

II.

At all times herein mentioned defendant Louis Stores Inc., was and is a corporation doing business in the State of California.

III.

At all times herein mentioned defendants, Tom Piperis, First Doe and First Doe Company were doing business in the City of Oakland, County of Alameda, State of California, under the fictitious name and style of Hopkins Food Center with their principal place of business at 3925 MacArthur Boulevard, Oakland, California. Said defendants owned and operated at said address a public market commonly referred to as Hopkins Food Center.

IV.

At all times herein mentioned defendants, Louis Stores, Inc., and Second Doe Company, were tenants of defendants, Tom Piperis, First Doe and

First Doe Company, operating a grocery concession or department in said Hopkins Food Center.

V.

At all times herein mentioned defendants, Earl Correia and Clifton Land, were agents, servants and employees of defendant Louis Stores, Inc., and defendants, First Doe, First Doe Company and Second Doe Company, and were acting in the course and scope of their employment and agency by said defendants.

VI.

At all times herein mentioned said Hopkins Food Center was so constructed and laid out that there were public aisles or thoroughfares running throughout said market. Said market consisted of various concessions, including a meat department, a produce department and a grocery department. Said public aisles or thoroughfares running throughout said market ran through said grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company. Said aisles and particularly the aisles running through said grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company, were open for the use of customers of said market and of said Louis Stores, Inc., and Second Doe Company.

VII.

On or about September 17, 1954, at or about 7:00 p.m. of said day, plaintiff was a business invitee of defendants above named in said Hopkins Food Center and in said grocery department oper-

ated by defendants, Louis Stores, Inc., and Second Doe Company, and was walking in an aisle open to the customers of said market and located in the grocery department operated by defendants, Louis Stores, Inc., and Second Doe Company.

VIII.

At said time and place defendants, and each of them, so carelessly and negligently operated, maintained and controlled said market and said grocery department therein and said aisle open to the public therein so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner so as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery department thereof lawfully using said aisle.

IX.

As a direct and proximate result of said carelessness and negligence of defendants, and each of them, as aforesaid, plaintiff was caused to trip and fall over said cardboard carton in said aisle and as a direct and proximate result of said fall in said aisle as aforesaid plaintiff received the injuries and damages hereinafter set forth.

X.

By reason of the premises plaintiff received the following injuries: Shock to her nervous system, comminuted fracture of the right olecranon, comminuted fracture of the right coronoid process, fracture of the proximal shaft of the right ulna, comminuted impacted fracture of the head of the

right radius, injury to the ulnar nerve in the right arm, injury to her right shoulder and neck, further injury to her previously defective hearing and other injuries presently undiagnosed.

Plaintiff is informed and believes, and therefore alleges upon such information and belief, that certain of said injuries will be permanent in nature, the extent of said permanent injuries being unknown to plaintiff at this time.

XI.

By reason of the premises it became necessary for plaintiff to incur expenses for hospitals, doctors, nurses, X-ray technicians and other services required in the care and treatment of her said injuries, and plaintiff's damage in this respect is presently unascertained as said services are still continuing, and plaintiff prays leave to insert her elements of damage in this respect when the same are finally determined.

XII.

At all times prior to September 17, 1954, plaintiff was physically able and in good health and was self-employed as a delicatessen operator and was operating a delicatessen known as Virginia's Delicatessen located in said Hopkins Food Center at 3925 MacArthur Boulevard, Oakland, California. As a direct and proximate result of said injuries received by plaintiff as aforesaid and as a direct and proximate result of the permanent injuries and disability suffered by plaintiff as a result of said injuries as aforesaid, plaintiff has been rendered physically unable to continue with her em-

ployment as a delicatessen operator and has been forced to terminate the operation of said delicatessen permanently. Plaintiff is informed and believes that she will be permanently incapacitated from engaging in her former employment as a delicatessen operator. Prior to said injuries plaintiff made a profit of approximately $3,000.00 per year from the operation of said delicatessen and plaintiff has thereby been damaged and will in the future be damaged in the sum of approximately $3,000.00 per year because of her inability to operate said delicatessen business in the future.

XIII.

By reason of the premises plaintiff has been generally damaged in the sum of $50,000.00.

Wherefore, plaintiff prays judgment against defendants, and each of them, as follows:

1. For general damages in the sum of $50,000.00;
2. For special damages as prayed for herein;
3. For costs of suit; and
4. For such other and further relief as the Court deems proper.

BRUCE WALKUP,
Attorney for Plaintiff

EXHIBIT "D"

[Title of Superior Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Come now defendants Louis Stores, Inc., a corporation, and Tom Piperis, and answering plain-

tiff's first amended complaint for damages plead as follows:

I.

Admit the allegation of paragraph II.

II.

Answering paragraph III, defendant Tom Piperis admits that on September 17, 1954, he was the owner of those certain premises located at 3925 MacArthur Boulevard, Oakland, California; defendant Tom Piperis admits and alleges in that connection that the aforesaid premises housed several independent businesses and that the premises had the collective name of "Hopkins Food Center"; defendant Piperis further alleges in this connection that "Hopkins Food Center" is merely a name designated for the convenience of his tenants, and that "Hopkins Food Center" is no legal entity of any kind, corporate, partnership or otherwise, and that "Hopkins Food Center" transacts no business of any kind; hence this defendant Piperis denies the allegations that he was doing business under the name and style of "Hopkins Food Center" or that he operated a public market, except in the sense that he leased certain portions of the premises located at 3925 MacArthur Boulevard to certain tenants operating independent businesses.

III.

Answering paragraph IV, these defendants admit that the defendant Louis Stores, Inc. was a tenant of defendant Tom Piperis and that Louis

Stores, Inc. was operating a grocery store in "Hopkins Food Center."

IV.

Answering paragraph V, these defendants admit that Earl Correia and Clifton Land were employees of defendant Louis Stores, Inc.

V.

Answering paragraph VI, these answering defendants admit the allegations therein contained in so far as said allegations apply to these defendants, or either of them.

VI.

Answering paragraph VIII, these answering defendants deny each and every allegation therein contained.

VII.

Answering paragraphs VII, IX, X, XI, XII and XIII, these defendants allege that they have no information nor belief sufficient to enable them to plead to the allegations therein contained and, basing their denial on that ground, deny each and every such allegation and deny, furthermore, that the plaintiff has been damaged in the amounts therein named, or in any other amount.

VIII.

As a separate and distinct answer and defense, these defendants allege that the plaintiff was herself careless and negligent in and about the accident described in the complaint and the injuries, if any, resulting therefrom in that she failed to use ordinary care for her own safety in looking where

she was walking; that plaintiff's carelessness and negligence as aforesaid proximately contributed to causing said accident and the injuries, if any, resulting therefrom.

IX.

As a further separate and distinct answer and defense, these defendants allege that the accident described in the first amended complaint and the injuries, if any, resulting therefrom constituted an unavoidable accident, without fault on the part of these answering defendants, or either of them.

Wherefore these answering defendants pray that plaintiff take nothing by her complaint and that they be hence dismissed with their costs.

EDWARD A. FRIEND,
Attorney for defendants Louis Stores, Inc. and Tom Piperis

EXHIBIT "E"

[Title of Superior Court and Cause.]

ANSWER TO FIRST AMENDED COMPLAINT

Come now the defendants Earl Correia and Clifton Land, and in answer to the first amended complaint of plaintiff on file herein, admit, deny and allege:

I.

These answering defendants are not required to answer the allegations of Paragraphs I, II, III, IV, V, VI and VII of said complaint.

II.

Answering the allegations of Paragraphs VIII,

IX and XIII of said complaint, these answering defendants deny each and every, all and singular, generally and specifically, the allegations contained therein; deny that plaintiff has been damaged in the sum of $75,000.00, or in any sum, or at all.

III.

Answering the allegations of Paragraphs X, XI and XII of said complaint, these answering defendants allege that they have no information or belief upon the subject sufficient to enable them to answer the said allegations, and placing their denial upon that ground deny each and every, all and singular, generally and specifically, the allegations contained therein.

As and for a second, separate, distinct and further answer and defense to the complaint of plaintiff, these answering defendants allege:

That plaintiff was guilty of contributory negligence in and about the matters and things set forth in said complaint and that she failed to use due or any care or caution for her own safety and protection, and failed to exercise her natural faculties, including that of eyesight, and that any and all damage sustained by plaintiff, if any such there was, was caused by her contributory negligence.

As and for a third, separate, distinct and further answer and defense to the complaint of plaintiff, these answering defendants allege:

That the damages or injuries, if any such there were, of which plaintiff now complains, were caused by unavoidable accident and without any fault of these answering defendants contributing thereto.

Wherefore, these answering defendants pray that plaintiff take nothing by her complaint and that the same be dismissed herefrom with costs to defendants.

HEALY AND WALCOM,
By LEO J. WALCOM,
Attorneys for Defendants Earl Correia and Clifton Land

Duly Verified.

Certificate of Service by Mail attached.

[Endorsed]: Filed December 6, 1955.

[Title of District Court and Cause.]

OPINION

Edward A. Friend, 519 California Street, San Francisco 4, California, Attorney for Plaintiff. Leo J. Walcom, 68 Post Street, San Francisco 4, California, Attorney for Defendant Ohio Farmers Indemnity Company. Lloyd M. Tweedt, Esq., Derby, Cook, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco 4, California, Attorneys for Defendants Underwriters at Lloyd's.

Hamlin, District Judge.

Complaining of personal injuries suffered in a certain store on September 17, 1954, one Virginia Christensen began an action against the owner of the store, Louis Stores, Inc. and one of its employees, Clifton Land, among others. Her original complaint was filed on January 31, 1955, and an amended complaint was filed on March 9, 1955, in which she alleged that each of the above defend-

ants negligently operated and maintained the store and a certain aisle therein, proximately causing her injuries. Louis Stores, Inc. and Land answered the complaint on March 14 and March 23, respectively, denying negligence and alleging contributory negligence on the part of Christensen. A trial was had before a jury which returned its verdict in favor of the plaintiff and against Louis Stores, Inc. and Land for $35,000, and judgment was entered against these defendants in this amount. That Judgment has now become final. The present action was begun when Canadian Indemnity Company filed a complaint against Ohio Farmers Insurance Company on October 28, 1954, asking for declaratory relief as to the rights of the parties regarding the liability of Louis Stores, Inc. An amended complaint seeking the same relief was filed on January 5, 1955 against Ohio and two groups of underwriters at Lloyd's London who had excess coverage on Louis Stores, Inc. above the Ohio policy.

The plaintiff in this action contends that the verdict against Louis Stores, Inc. was rendered solely on the theory of respondeat superior, and that therefore under the doctrine of Canadian Indemnity Co. v. U. S. Fidelity & Guaranty Co., 9 Cir., 213 F. 2d 658, the employer Louis Stores, Inc. can recover from its employee Land on the ground that Land's negligence was the sole cause of the accident. The defendant contends that there is no way of determining whether the finding of the jury was on the basis of Land's sole negligence or whether the jury's finding was that each

party was independently negligent. The accident occurred between 7 and 9 p.m., when the plaintiff tripped over a carton of bottled water which had been left in an aisle in a market operated by Louis Stores, Inc. At that time, Land was the only adult employee on duty and his primary duties, according to his testimony, required his attendance at the check stand where customers were receiving their purchases. While attending his duties at the check stand he had allowed the offending carton which had been placed there by a courtesy boy, a minor, to remain in the aisle. From the evidence presented, the Court is unable to say that the finding of respondeat superior was the only finding that could have been made. The jury may have found Louis Stores, Inc. negligent in not providing enough employees or in not properly instructing its employees what to do. There was enough evidence on which to base such a finding, and the jury were instructed that they could return a verdict against Louis Stores, Inc. and not against Land. The evidence at the trial could not remove the possibility that the jury made a finding that each defendant was independently negligent.

Plaintiff further relies for recovery upon establishing that Land was an insured under the Ohio Farmers policy. Land was not included in the definition of the insured in that policy,[1] and from a

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[1] The Ohio Farmers policy reads as follows, in material part:

"Item 1. Name of Insured Louis Stores, Inc. * * *

"Insuring Agreements * * * III. Definition of Insured. The unqualified word 'Insured' includes

reading of Endorsement #4 of that policy[2] it

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the Named Insured and also includes (1) under Coverages B and D, any partner, executive officer, director, or stockholder thereof while acting within the scope of his duties as such, and (2) under Coverages A and C, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the Named Insured or with his permission, and any executive officer of the Named Insured with respect to the use of a non-owned automobile in the business of the Named Insured. * * * "

[2] "Defense of Employees"

"1. The Company will defend, if and when requested in writing to do so by the Named Insured in the name and on behalf of any employee of the Insured, any suit alleging Bodily Injury, death or any set [sic] covered by this policy or any endorsement attached thereto, and will pay all costs taxed against such employee in any suit, provided, however, that the Named Insured either is joined or if not joined, could properly have been joined as defendant in such suit, and provided further, that the suit either is one which this company is obligated under said policy to defend on behalf of said Named Insured, or is one which this company would have been so obligated to defend if said Named Insured had been joined as a defendant.

"2. The Company will also pay any loss by liability imposed upon any said employees by final judgment in any such suit and will pay all interest accruing after entry of said final judgment upon such part of same as is not in excess of the Company's limits of liability as specified in the Declarations.

"3. It is understood and agreed that this Policy of Insurance is a contract between the Ohio Farmers Indemnity Company and the Named Insured and that nothing herein shall be construed as creating any privity of contract between the Ohio

would appear that Land had no right against Ohio Company to insist that he was insured or that coverage be extended to him or that certain benefits of the policy would flow to him. Endorsement #4 further provided that there was no privity of contract between Land and Ohio. From the language of the policy, the Court cannot find that Land is an insured under that policy.

The language of the Canadian and Ohio policies with respect to other insurance is identical with that involved in Air Transport Mfg. Co. v. Employers Liability Corp., 204 P. 2d 647, in which the Court held that the liability of the insurers should be prorated. This is also the rule of Oregon Auto Ins. Co. v. U. S. Fidelity & Guaranty Co., 9 Cir., 195 F. 2d 958. Therefore, it is the opinion of this Court that the rights of the parties in respect to the liability of Louis Stores, Inc., is that Canadian pay ten-elevenths of any judgment, and Ohio pay one-eleventh. Since the two policies of Lloyd's are effective only after the Ohio policy is exhausted, the Lloyd's policies are not liable at all in the situation presented here.

Dated: April 20, 1956.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed April 20, 1956.

Farmers Indemnity Company and any employees of the Named Insured, nor shall this paragraph confer any rights upon said employees which said employees would not have had if this paragraph had not been written. * * *"

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 27th day of January, 1956, before the Court sitting without a jury, a jury having been duly waived by the parties;

Edward A. Friend, Esq. appeared as attorney for plaintiff The Canadian Indemnity Company, a corporation; Leo J. Walcom, Esq. appeared as attorney for defendant Ohio Farmers Indemnity Company, a corporation; Derby, Cook, Quinby & Tweedt, by Lloyd M. Tweedt, Esq. appeared as attorneys for defendants The Prudential Assurance Company Limited of London, a corporation, and Frank B. Allison and other Underwriters at Lloyd's London subscribing to Lloyd's policy No. 32913-L;

Evidence, both oral and documentary, having been introduced and the cause submitted for decision, the Court now, after due deliberation thereon and consideration of the arguments of counsel, finds the facts and makes the conclusions of law as follows:

I.

Plaintiff is now and was at all times herein mentioned a corporation organized and existing under the laws of Canada.

Defendant Ohio Farmers Indemnity Company is now and was at all times herein mentioned a cor-

poration organized and existing under the laws of the State of Ohio.

Defendant The Prudential Assurance Company Limited of London is now and was at all times herein mentioned a corporation organized and existing under the laws of the United Kingdom of Great Britain and Ireland.

Defendants Frank B. Allison and other underwriters at Lloyd's London subscribing to policy No. 32913-L are now and were at all times herein mentioned, residents and subjects of the United Kingdom of Great Britain and Ireland.

II.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars ($3,000.00).

On or about January 31, 1955, one Virginia Christensen filed a complaint in the Superior Court of the State of California, in and for the County of Alameda, numbered 263199 therein, against Louis Stores, Inc., a corporation, Hopkins Food Center, Piperis Brothers, Tom Piperis, Earl Correia, Clifton Land and Donald Nolan. On or about March 9, 1955, said Virginia Christensen filed an amended complaint in said action. Said amended complaint alleged that said Virginia Christensen suffered personal injuries on September 17, 1954, while shopping in a store operated by defendant Louis Stores, Inc.; that defendants, and each of them, so carelessly and negligently operated, maintained and controlled said market and said grocery department

therein, and said aisle open to the public therein, so as to cause and permit a cardboard carton to be in said aisle in said grocery department in such manner as to render said aisle dangerous to the passage of customers and business invitees in said market and said grocery thereof lawfully using said aisle, and that as a result thereof the plaintiff was injured. Defendants Tom Piperis, Hopkins Food Center, Louis Stores, Inc., Clifton Land and Earl Correia answered said amended complaint, denying negligence and alleging contributory negligence.

Plaintiff in said action dismissed as against Hopkins Food Center and all fictitious defendants. The motion of defendant Tom Piperis for nonsuit was granted, so that the action was submitted to the jury as to defendants Earl Correia, Clifton Land and Louis Stores, Inc. The jury returned a verdict in favor of plaintiff against Clifton Land and Louis Stores, Inc.; and against plaintiff in favor of defendant Earl Correia. The amount of the judgment was $35,000.00 as entered on said verdict and the judgment has now become final.

Paragraph V of the first amended complaint alleged that defendants Earl Correia and Clifton Land were the employees of defendant Louis Stores, Inc. This allegation was admitted by the answers of Tom Piperis and Louis Stores, Inc.

The Court instructed the jury in said action on the doctrine of respondeat superior and also instructed the jury that they could find a verdict against Louis Stores, Inc. and not against its em-

ployee, Clifton Land. The Court also gave to the jury in said action a form of verdict which found in favor of plaintiff Virginia Christensen and against defendant Louis Stores, Inc., and which further found in favor of defendant Clifton Land.

IV.

It cannot be determined whether the verdict and judgment against Louis Stores, Inc., in said Christensen action was based on independent negligence on the part of said Louis Stores, Inc. and/or on the basis of respondeat superior for the acts or omissions of its employee, Clifton Land. There is sufficient evidence in the record to support a verdict upon either basis.

V.

Plaintiff The Canadian Indemnity Company issued a policy of insurance number 25 CPL 1911, insuring said Louis Stores, Inc. against liability for bodily injuries to a person or persons injured on the premises of said store to a limit of $100,000.00. Said policy was in force and effect at the time said Virginia Christensen was injured. Said policy did not insure said Clifton Land. Said policy contained another insurance clause reading as follows:

"Other Insurance—If at the time of an accident there is any other insurance available to the insured (in this or any other carrier) there shall be no insurance afforded hereunder as respects such accident except that if the applicable limit of liability of this policy is in excess of the applicable

limit provided by the other insurance available to the insured this policy shall afford excess insurance over and above such other insurance in an amount sufficient to afford the insured a combined limit of liability equal to the applicable limit of liability afforded by this policy. It is further provided that in respect of loss arising out of the operating, maintenance or use of any non-owned automobile other than a hired automobile, the applicable insurance afforded by this policy shall be excess over and above such other available insurance. Insurance under this policy shall not be construed to be concurrent or contributing with any other insurance which is available to the insured."

VI.

Defendant Ohio Farmers Indemnity Company issued a policy of insurance, number CL 7591, insuring said Louis Stores, Inc. against liability for bodily injuries to persons injured on the premises of said store to a limit of $10,000.00 each person. Said policy was in force and effect at the time said Virginia Christensen was injured. Said policy of Ohio Farmers Indemnity Company contains a typewritten endorsement No. 4 reading as follows:

"Defense of Employees

The Company will defend, if and when requested in writing to do so by the Named Insured in the name and on behalf of any employee of the insured, any suit alleging Bodily Injury, death or any set covered by this policy or any endorsement attached thereto, and will pay all costs taxed against such

employee in any suit, provided, however, that the Named Insured either is joined or if not joined could properly have been joined as defendant in such suit, and provided further, that the suit either is one which this company is obligated under said policy to defend on behalf of said Named Insured or is one which this company would have been so obligated to defend if said Named Insured had been joined as a defendant.

2. The Company will also pay any loss by liability imposed upon any said employees by final judgment in any such suit and will pay all interest accruing after entry of said final judgment upon such part of same as is not in excess of the Company's limits of liability as specified in the Declarations.

3. It is understood and agreed that this Policy of Insurance is a contract between the Ohio Farmers Indemnity Company and the Named Insured and that nothing herein shall be construed as creating any privity of contract between the Ohio Farmers Indemnity Company and any employees of the Named Insured, nor shall this paragraph confer any rights upon said employees which said employees would not have had if this paragraph had not been written.

4. It is further understood and agreed that anything herein above or elsewhere contained or expressed to the contrary notwithstanding, the Company will under no circumstances whatsoever provide Coverage except where the act of the employee was committed in good faith and is within the scope of employment.

5. The insurance provided by this endorsement shall be excess insurance over any other valid and collectible insurance available to any employee of the Named Insured."

Said policy did not insure Clifton Land. Said policy contained another insurance clause reading as follows:

"Other Insurance. If the Insured has other insurance against a loss covered by this policy the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned or hired automobile shall be excess insurance over any other valid and collectible insurance available to the Insured, either as an Insured under a policy applicable with respect to such automobile or otherwise."

VII.

The said policies of insurance issued by plaintiff The Canadian Indemnity Company and defendant Ohio Farmers Indemnity Company, respectively, afforded protection and indemnity to Louis Stores, Inc. against the liability created by the judgment in favor of said Virginia Christensen; and each of said policies was written and issued as primary insurance and each, in the absence of the other, primarily insured within policy limits against the liability of Louis Stores, Inc. arising from said

judgment. There are no facts on the basis of which the provisions of either of said policies with respect to other insurance should or may be reasonably preferred to the other and the total liability of Louis Stores, Inc. under said judgment should be pro-rated between said two insurers on the basis of their respective policy limits.

VIII.

Defendant The Prudential Assurance Company Limited of London issued a policy of insurance, number EB 32914-C, insuring said Louis Stores, Inc. against liability for bodily injuries to persons injured on the premises of said store for a limit of $40,000.00 each person excess over the $10,000.00 limit provided for in said policy of Ohio Farmers Indemnity Company. Said policy issued by said The Prudential Assurance Company Limited of London further provided that liability shall attach thereunder only after the said primary insurer has paid or has been held liable to pay the sum of $10,000.00 to any one person for bodily injuries. Said policy did not insure said Clifton Land.

IX.

Defendants Frank B. Allison and other underwriters at Lloyd's, London, issued a policy of insurance number EB 32913-L, insuring said Louis Stores, Inc. against liability for bodily injuries to persons injured on the premises of said store for a limit of $450,000.00 each person excess over the combined limits of $50,000.00 provided for in said policies of said Ohio Farmers Indemnity Company

and The Prudential Assurance Company, Limited, of London. Said policy No. 32913-L further provided that liability thereunder shall attach only after said primary insurer and first excess insurer have paid or have been liable to pay the sum of $50,000.00 to any one person for bodily injuries. Said policy did not insure said Clifton Land.

Conclusions of Law

I.

Said Louis Stores, Inc. and Clifton Land were held jointly liable by the verdict and judgment against them in favor of Virginia Christensen.

II.

Clifton Land was not an insured under any of the policies of insurance issued by plaintiff or by defendants and is not entitled to enforce the provisions of any said policies.

III.

The policies of insurance issued by The Canadian Indemnity Company and by Ohio Farmers Indemnity Company insured the liability of Louis Stores, Inc. arising by virtue of the judgment in favor of said Virginia Christensen; that said policies constituted concurrent insurance against said liability; that said insurers are obligated to respond to and satisfy said judgment in the following proportions: ten-elevenths by The Canadian Indemnity Company; one-eleventh by Ohio Farmers Indemnity Company.

IV.

The policy of excess insurance number EB 32914-C, issued by The Prudential Assurance Company Limited of London does not attach to the liability of Louis Stores, Inc. under said judgment and said insurer is not obligated to respond to nor to satisfy said judgment or any part thereof.

V.

The policy of second excess insurance, number EB 32913-L, issued by Frank B. Allison and other underwriters at Lloyd's London does not attach to the liability of said Louis Stores, Inc. under said judgment and said insurers are not obligated to respond to nor to satisfy said judgment or any part thereof.

VI.

Defendants, and each of them, are entitled to judgment for their costs of suit herein against plaintiff.

Let judgment be entered accordingly.

Dated: June 5, 1956.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed June 5, 1956.

In the District Court of the United States, Northern District of California, Southern Division

No. 34158

THE CANADIAN INDEMNITY COMPANY, a corporation, Plaintiff,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, JOHN DOE, and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB 32914-C; RICHARD ROE and all other underwriters at Lloyd's London subscribing to Lloyd's Policy No. EB 32913-L, Defendants.

JUDGMENT

This cause came on regularly for trial before the Court sitting without a jury, the parties having appeared by their respective counsel and the issues having been duly tried and argued, and the Court having heretofore filed its memorandum opinion and having made its findings of fact and conclusions of law directing judgment as hereinafter provided;

Wherefore, by reason of the law and said findings of fact, it is now Ordered, Adjudged and Decreed that the rights, duties and obligations of the parties hereto are declared as follows:

1. The policies of insurance, numbers 25 CPL 1911 and CL 7591, issued respectively by plaintiff The Canadian Indemnity Company and defendant

Ohio Farmers Indemnity Company, insured the liability of Louis Stores, Inc. under the judgment in favor of Virginia Christensen against said Louis Stores, Inc. in action number 263199 in the Superior Court of the State of California, in and for the County of Alameda; that said policies constituted concurrent insurance against said liability; that said The Canadian Indemnity Company is obligated to pay ten-elevenths of the amount necessary to satisfy said judgment and said Ohio Farmers Indemnity Company is obligated to pay the remaining one-eleventh of the amount necessary to satisfy said judgment.

2. The policy of excess insurance number EB 32914-C issued by The Prudential Assurance Company Limited of London does not attach to the liability of Louis Stores, Inc. under said judgment and said insurer is not obligated to respond to nor to satisfy said judgment or any part thereof.

3. The policy of second excess insurance number EB 32913-L issued by Frank B. Allison and other underwriters at Lloyd's London does not attach to the liability of said Louis Stores, Inc. under said judgment and said insurers are not obligated to respond to nor to satisfy said judgment or any part thereof.

4. Clifton Land was not an insured under any of the policies of insurance issued by plaintiff or by defendants and is not entitled to enforce the provisions of any said policies.

5. Defendants herein, and each of them, have and recover from plaintiff The Canadian Indem-

nity Company their respective costs and disbursements taxed herein as follows:

$..... for defendant Ohio Farmers Indemnity Company

$..... for defendant Frank B. Allison

$..... for defendant The Prudential Assurance Company Limited of London.

Dated: June 5, 1956.

/s/ O. D. HAMLIN
United States District Judge

Entered in Civil Docket June 5, 1956.

[Endorsed]: Filed June 5, 1956.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Plaintiff The Canadian Indemnity Company hereby moves the Court that it vacate the judgment rendered on June 5, 1956, and grant plaintiff a new trial upon the grounds that the judgment rendered is not supported by the evidence and that it is contrary to law.

Dated: June 14th, 1956.

/s/ EDWARD A. FRIEND,
Attorney for Plaintiff

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause.]

ORDER

It is hereby ordered that the plaintiff's motion for a new trial is denied.

Dated: July 26, 1956.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed July 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Defendants Ohio Farmers Indemnity Company, The Prudential Assurance Company Limited of London and All Other Underwriters of Lloyd's London Subscribing to Lloyd's Policy No. EB32914-C, and to Leo J. Walcom, Esquire, and Messrs. Derby, Cook, Quinby & Tweedt, their respective attorneys:

Notice Is Hereby Given that plaintiff The Canadian Indemnity Company, a corporation, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment of this court filed June 5, 1956, declaring the rights of the parties, and from each part thereof.

Dated: July 27, 1956.

/s/ EDWARD A. FRIEND,
Attorney for Plaintiff and Appellant

Certificate of Service by Mail attached.

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Whereas, the plaintiff The Canadian Indemnity Company, a corporation, has appealed to the United States Court of Appeals for the Ninth Circuit from the judgment of declaratory relief rendered in said District Court in the above entitled cause on the 5th day of June, 1956,

Now, therefore, the undersigned surety company does hereby undertake and promise on the part of the appellant and does hereby acknowledge itself bound in the sum of $250.00, conditioned that the appellant shall pay all costs adjudged against it in the event that the judgment is affirmed or that the appeal is dismissed, and conditioned further that the appellant shall pay such costs as the Appellate Court may award against it if judgment is modified.

Dated: This 6th day of August, 1956.

ST. PAUL-MERCURY
INDEMNITY COMPANY

[Seal] By D. KEITH JOHNSON,
Its Attorney-in-Fact

Acknowledgment of Attorney-in-Fact attached.

[Endorsed]: Filed August 8, 1956.

[Title of District Court and Cause.]

EX PARTE ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING APPEAL

Owing to the temporary absence from the bay area of H. A. Cannon, a court reporter who reported part of the oral proceedings held in this court,

It is hereby ordered that the time for filing the record on appeal and docketing the appeal may be extended to and including the 15th day of October, 1956. (F.R.C.P. 73(g).)

Dated: September 6, 1956.

/s/ LOUIS GOODMAN,
Judge of the U. S. District Court

Certificate of Service by Mail attached.

[Endorsed]: Filed September 6, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by attorneys for appellant and appellees:

Excerpt from Docket Entries

Stipulation for Filing First Amended Complaint

First Amended Complaint

Answer of Ohio Farmers Indemnity Company to First Amended Complaint

Answer of Prudential Assurance Company of London, a corporation (sued herein as John Doe)

Interrogatories by Plaintiff to Defendant

Answer of Defendant to Interrogatories by Plaintiff, with exhibits

Interrogatories by Ohio Farmers Ins. Co. to plaintiff

Answer of Plaintiff to Interrogatories by Ohio Farmers Ins. Co., with exhibits

Request of Plaintiff for Admissions by Defendants, with exhibits

Opinion of Court

Findings of Fact and Conclusions of Law

Judgment

Proposed Modifications by Plaintiff to Findings of Fact and Conclusions of Law

Motion of Plaintiff for New Trial

Order Denying Motion for New Trial

Notice of Appeal

Bond on Appeal

Appellant's Designation of Record on Appeal

Appellees' Designation of Record on Appeal

Order Extending Time to Docket Appeal

Stipulation for Correction of Reporter's Transcript

Stipulation for Correction of Reporter's Transcript

Stipulation for Correction of Reporter's Transcript

Reporter's Transcript of Proceedings, January 27, 1956

Reporter's Transcript of Proceedings, July 26, 1956

Plaintiff's Exhibits 1, 2 and 3

Defendants' Exhibits A and B

In witness whereof, I have hereunto set my hand and affixed the seal of said District Court this 15th day of October, 1956.

C. W. CALBREATH,
Clerk
/s/ By MARGARET P. BLAIR,
Deputy

[Title of District Court and Cause.]

MOTION FOR DECLARATORY RELIEF REPORTER'S TRANSCRIPT

Before: Hon. Oliver D. Hamlin, Judge.

January 27, 1956

* * * * *

The Court: And so to set the record straight, it is stipulated by counsel that all of the statements contained in the requests for admissions filed December 6th, 1955, are true, is that right?

Mr. Tweedt: Yes, your Honor.

Mr. Wal*cott*: Yes, your Honor.

The Court: Both sides stipulated. All right.

Mr. Friend: And I believe, your Honor, we have

already stipulated that no motion for a new trial nor an appeal has been filed in the Alameda County Superior Court action, and that it is contemplated that that judgment will become final by operation of law within the next two or three days because the 60-day period for appeal will have run by that time.

The Court: Is that stipulated, gentlemen?

Mr. Walcom: Yes, your Honor.

Mr. Tweedt: Yes, your Honor.

The Court: By all sides. All right.

* * * * *

[Endorsed]: Filed August 24, 1956.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

MOTION FOR NEW TRIAL

Thursday, July 26, 1956

* * * * *

Mr. Walcom: Now, to face reality and not be misled, counsel puts much emphasis on the demand of the insured to take over the defense of Clifton Land and cites and claims that is an admitted fact because of the request for admission not being denied. Let's not forget for a moment that no demand was ever made by Louis Stores in this case. A letter by Mr. Friend, who at that time on behalf of the Canadian Indemnity had undertaken the defense of Louis Stores, merely directed to Ohio the request, stating that he was the attorney for the Louis Stores in the above-entitled action, and I

think candor and honesty would compel the fact that he has never represented Louis Stores in its personal matters, and he asks that those defenses be taken over. But it is a false issue in that we admit that we defended Land and Correia.

* * * * *

Mr. Friend: Mr. Walcom also argues that the request that they defend was not made by the named insured. He then adds, as he must, that they did in fact defend, so that is no longer an issue. But I would like to direct the Court's attention to that specific request, which is in Exhibit B attached to the request for admissions. It was a registered letter sent to Ohio Farmers in which I say that I am the attorney for Louis Stores, Inc. in this action, which I was, and I made specific requests on behalf of Louis Stores, Inc. that Ohio Farmers defend those employees.

Now, Ohio Farmers might conceivably have written back to me saying: You do not represent Louis Stores, Inc., you are an imposter representing Canadian Indemnity Company, and we do not recognize your request. But they did not do that. They defended pursuant to such request and they cannot be heard at this time to say that there was no request by the named insured.

* * * * *

[Endorsed]: Filed September 25, 1956.

[Endorsed]: No. 15335. United States Court of Appeals for the Ninth Circuit. Canadian Indemnity Company, a corporation, Appellant, vs. Ohio Farmers Indemnity Company and Prudential Assurance Company of London, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: October 15, 1956.

Docketed: October 22, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth District.

United States Court of Appeals
for the Ninth Circuit

No. 15335

THE CANADIAN INDEMNITY COMPANY, a corporation, Plaintiff and Appellant,

vs.

OHIO FARMERS INDEMNITY COMPANY, a corporation, et al.,
Defendants and Appellees.

STATEMENT OF POINTS ON APPEAL

Appellant herewith presents the points upon which it claims the District Court erred:

1. Finding, conclusion and judgment that Clifton Land was not insured under the policies of in-

surance issued by defendants herein are not supported by the evidence and are against the law.

2. Finding and conclusion that the verdict and judgment against Louis Stores, Inc., in the Alameda County Superior Court action was based on the independent negligence of Louis Stores, Inc. and not on the basis of respondeat superior for the negligence of its employee Clifton Land are not supported by the evidence and are against the law.

3. In failing to apply to the facts at bar the holding of the United States Court of Appeals for the Ninth Circuit in Canadian Indemnity Co. v. U. S. F. & G., 213 Fed. (2d) 658, affirming U. S. F. & G. v. Canadian Indemnity Co., 107 Fed. Supp. 683.

4. In failing to find that Clifton Land was the only active tort feasor, even if Louis Stores, Inc. was independently negligent toward the plaintiff in the Alameda County Superior Court action, and that hence the onus of paying the personal injuries judgment rendered in the Superior Court should fall upon Clifton Land and his insurers.

/s/ EDWARD A. FRIEND,
Attorney for Appellant

Certificate of Service by Mail Attached.

[Endorsed]: Filed October 22, 1956. Paul P. O'Brien, Clerk.